Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-953

HELEN B. FEENEY,

Appellant,

v.

PERSONNEL ADMINISTRATOR OF THE COMMONWEALTH OF MASSACHUSETTS, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

MOTION TO AFFIRM

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Acting pursuant to Rule 16 of the Rules of the Supreme Court of the United States and for the reasons set forth in the following pages, Appellees hereby move that the final judgment and decree of the District Court be affirmed on the ground that the question presented by the jurisdictional statement is so unsubstantial as not to require further argument.

PRELIMINARY STATEMENT

As the Jurisdictional Statement suggests, this cause has been before this Court on several prior occasions.[1/] Unlike the prior occasions when this Court's jurisdiction has been invoked to hear this matter, this appeal raises no significant constitutional questions. Rather than presenting substantive argument that the Massachusetts Veterans Preference Statute, Mass. Gen. Laws c. 31, § 26 violates the equal protection or due process clauses of the Fourteenth Amendment, the current appeal raises only questions concerning the decision of the District Court after remand not to permit the plaintiff to brief and argue an alternative due process theory which had not been previously developed in any of the prior proceedings. This discrete procedural issue does not present a substantial question requiring further consideration by this Court.

Last term this Court gave plenary consideration to this cause and held the employment preference extended to eligible veterans by Massachusetts law did not

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1/ The procedural history of this case is adequately set forth in the jurisdictional statement (hereinafter cited as JS) pages 2-14, and is not repeated herein. Except as explicitly noted, the Appellees accept the preliminary materials contained in the jurisdictional statement.

discriminate against females in violation of the equal protection clause of the Fourteenth Amendment. This Court therefore reversed the decision of the United States District Court for the District of Massachusetts and remanded this cause for "proceedings consistent with its opinion." Personnel Administrator of Massachusetts v. Feeney, __U. S.__, 99 S.Ct. 2282 (1979). The earlier lower court decision had been premised entirely on a perceived violation of the equal protection clause. Anthony v. Commonwealth of Massachusetts, 415 F. Supp. 485, 499 n. 15 (D.C. Mass) 1976. Insofar as this Court decided the Equal Protection claim, the major issue facing the District Court on remand arose from plaintiff's originally asserted but unresolved due process claim.

The three judge panel on remand did consider and decide the plaintiff's pre-existing due process claims. After a hearing,[2/] the lower court expressly rejected the plaintiff's previously articulated gender-based claims, noting that the issues had been previously briefed and argued (J.S. 7a, n.3), that the arguments made had been rendered "insubstantial" by this Court's opinion

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2/The District Court's decision and order on remand are reported at 475 F.Supp. 109 (D. Mass. 1979). The citations to that decision and order in this brief, however, are to the Court's decision which is reproduced in the Jurisdictional Statement as Appendix A, B, and C, pages 1a-21a.

(J.S. 6a), and that further arguments on the sex-based due process claims served no purpose (J.S. 7a). Although the Appellees will concede that the plaintiff's complaint, briefs and arguments from the outset of this litigation encompassed the assertion that the alleged systematic exclusion of women from public employment resulting from application of the veterans preference statute violated the due process clause of the Fourteenth Amendment, the Plaintiff has not challenged the adverse rulings on her original due process claims in these proceedings.3/

3/ The question the Plaintiff poses to this Court on this appeal is: "Did the District Court err in refusing to consider and decide plaintiff's claim that the absolute veterans preference statute, Mass. Gen. Laws. c. 31, § 26, by its wholesale denial of access to public employment deprives her of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment." (J.S. 5) Under Rule 15 (1)(c) of the Rules of the Supreme Court of the United States ". . . Only the questions set forth in the jurisdictional statement or fairly comprised therein will be considered by the Court." One can hardly argue that the discrete procedural question set forth in the jurisdictional statement (J.S. 5), embraces a substantive due process challenge to the Massachusetts Veteran's Preference statute. Thus, the Plaintiff must be deemed to have waived her appellate rights on the issue of whether the application of the Massachusetts public employment law deprives female job applicants of due process in contravention of the Fourteenth Amendment.

The lower court did refuse however, to consider what it correctly perceived to be a new due process claim, i.e. "that the Massachusetts Veterans Preference law denies access to public employment on a wholesale basis and therefore deprives the excluded non-veterans, who would be male as well as female of liberty." (J.S. 4a, 5a) That refusal to broaden the scope of the district court proceedings came nearly four years after the complaint was filed and only after plaintiff's primary gender-based claims had been rejected.

From its inception, this matter has been treated by the parties and the Courts as a sex-discrimination case: the agreed statement of facts, the briefs of the parties and the decisions of the courts all amply demonstrate that fact. A typical characterization of the plaintiff's cause of action appears in the introduction to the plaintiff's original brief on the merits to the District Court:

> "The plaintiffs in these actions are <u>women</u> who have been deprived of equal consideration for particular Civil Service employment opportunities as a result of the defendants' application of the Veterans' Preference Statute. Since the application of this statute by the defendants has a significantly disproportionate adverse impact on <u>women</u> seeking Civil Service positions, the plaintiffs respectfully submit that their right to equal protection of the Commonwealth's law, as secured to them by the Fourteenth Amendment to the United States

> Constitution, has been violated. The plaintiffs also submit that their Constitutionally-protected right to due process has been violated." Brief for the Plaintiffs, p.1 (emphasis added).

That the lower court shared this view of the case is made manifest in the opening sentence of the original district court opinion: "[challenge to] . . . Massachusetts Veterans' Preference Statute, Mass. Gen. Laws c. 31, § 23, which [plaintiff's] claim unconstitutionally discriminates against them because of their sex." Anthony v. Commonwealth of Massachusetts, 415 F.Supp. 485, 487 (D. Mass. 1976.) The Court's view is made more explicitly in the District Court's attempt to distinguish this action from others which had challenged veterans preference legislation on a non-gender specific basis. Id. at 496, 497, n.11. The decision not to allow the plaintiff to proceed anew under an alternative due process theory was clearly correct and should be affirmed by this Court.

The plaintiff now argues that it was error for the District Court not to consider a non-gender based argument for the first time on remand. In support of this argument, the Plaintiff/Appellant does not assert that there is a conflict between the circuits on the procedural issue presented, nor does she cite any direct authority for the proposition that after remand, the lower court was required to consider her new argument. Instead, the

jurisdictional statement speaks of the "spirit" of the Federal Rules of Civil Procedure, which require a liberal interpretation of pleadings to preserve the valid, but inartfully expressed and sometimes excusably overlooked, claims of litigants. (J.S. 16-18). She then analogizes this case to a series of matters decided in the preliminary stages of litigation upon a party's motion to dismiss under Fed.R.Civ.P. Rule 12, upon motions for summary judgment under Fed.R.Civ.P. 56, or within the spirit of Fed.R.Civ.P. 8.

These analogies are not appropriate to this case. This cause is not in the preliminary stages of litigation. The complaint was filed in the spring of 1975 and the Statement of Agreed Facts, which comprise the record in this case, was filed that summer. Therefore, the issues in this case have been joined for more than four years. If an analogy in the Federal Rules of Civil Procedure is proper under these circumstances, plaintiff's request to brief and argue this alternate claim is more appropriately compared to those requests which invoke the liberal spirit of the Federal Rules of Civil Procedure after trial has concluded and judgment has been entered.[4/] A consideration of

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[4/] Examples, of such post trial/post judgment motions are: Motions to Amend under Federal Rules of Civil Procedure 15; Motions for Relief from Judgment or Orders under Fed.R.Civ.P. 60; Motions for New Trials, Amendment or Judgments under Fed.R.Civ.P. 59.

the standards that the Courts commonly utilize in ruling on such requests leave no doubt that the decision of the District Court was correct and should be affirmed.

ARGUMENT

The Argument That the Lower Court Was Required On Remand to Permit the Plaintiff To Brief and Argue a Previously Undeveloped Due Process Theory Does Not Present A Substantial Question Requiring Further Consideration By This Court.

A. The Nature of Proceedings on Remand is Committed to the Discretion of the Trial Court.

It is a basic proposition that in the absence of a specific mandate or limiting instructions from an appellate court, the nature and extent of proceedings on remand is committed to the discretion of the district court. Sherwin v. Welch, 319 F.2d 729 (D.C. Cir. 1963); United States v. 63.04 Acres of Land, 257 F.2d 68 (2nd Cir. 1958); and See 3 Moore's Federal Practice §15.11, 6 Moore's Federal Practice §59.06-07, 59.16 (1953).[5/]

[5/]Even where a case is remanded to the trial court with directions to undertake a specific act or reach a particular result, the trial court is vested with a wide range of discretion in determining the method of compliance. Sprague v. Ticonic National Bank, 307 U.S. 161 (1939); Wm. G. Roe & Co. v. Armour & Co., 414 F.2d 862 (5th Cir. 1969); Holliday v. Pacific Atlantic S.S. Co., 117 F.Supp. 729, 732 (D. Del. 1953).

Apparently, the plaintiff does not take issue with this blackletter proposition, but suggests that the trial court must, years after the case has been submitted and the issues joined, allow her leave to develop alternate constitutional theories subsumed in the complaint but never previously argued. The Plaintiff appears to suggest that having once invoked the broad mantel of the due process clause in a single paragraph of her complaint, the trial court must permit her on remand to argue any due process theory she can devise.

The Commonwealth and its officers do not contend that the district court was precluded from allowing the plaintiff to change the basic thrust of her case. Recognizing that on a general order of remand and in appropriate circumstances the trial court has authority to permit amendments to original pleadings where justice so requires, Bryan v. Austin, 354 U.S. 933 (1957); Chicano Police Officer's Association v. Stover, 552 F.2d 918 (10th Cir. 1977) the state defendants have instead argued that considerations of judicial economy, comity, and fundamental fairness all dictated against permitting such a shift in theory to occur. In the total absence of contrary authority, the Commonwealth continues to assert that once the trial court was revested with jurisdiction by the order of remand, the decision whether or not to permit a change in the basic thrust of

the case was committed to its sound discretion and may be reversed only upon a showing of abuse of discretion. The plaintiff makes no such showing.

B. The District Court's Decision Not to Permit the Plaintiff to Brief and Argue a New Due Process Theory Was A Proper Exercise of Discretion.

By asserting that the decision whether to permit major shifts in litigation is within the sound discretion of the trial court, the Appellees do not mean to suggest that there are neither limits to that discretion nor guidelines for its proper exercise. To the contrary, both the parties seem to argue that the Federal Rules of Civil Procedure, their underlying "spirit" and the cases construing the rules provide an appropriate touchstone against which the action of the trial court may be measured. The parties apparently disagree, however, on which rules govern the instant case.

In her argument that the trial court was compelled to consider her non-gender specific due process claim, the Plaintiff cites a series of cases all dealing with the early termination of litigation. (J.S. 16-18) She references cases dealing with the broad scope of Fed. R. Civ. P. 8 in the context either of appellate review of motions to

dismiss[6/] or motions for summary judgment.[7/] However, it is one thing to suggest that imprecise pleadings ought not deny an unsophisticated plaintiff an opportuntiy to be heard on her claims. It is quite another to permit a well-represented individual to change the basic thrust of a case after losing her original claim.[8/] On the particular facts of this case, the

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6/Session v. Chrysler Corp., 517 F.2d 759, (9th Cir. 1975); Jenkins v. Fidelity Bank, 365 F. Supp. 1391 (E.D. Pa. 1973); PDTC Owners Association v. Coachetta Valley Cty. Water, 443 F.Supp. 338 (C.D. Cal. 1978); Rohler v. TRW, Inc., 576 F.2d 1260 (7th Cir. 1978).

7/International Distributing Corp. v. American District Telegraph Co., 569 F.2d 136, 139 (D.C. Cir. 1977). The Plaintiff cites an additional case which is of no support to her cause. See Janke Construction Co. V. Vulcan Materials Co., 527 F.2d 772 (7th Cir. 1976). There the Court ruled that the trial Court did not err in its award of damages to the Plaintiff even though the plaintiff neglected to raise the doctrine of promissory estoppel. Surely the Plaintiff does not suggest that the District Court was responsible for locating the proper theory on which she had the best chance of success.

8/Rodriguez de Quionez v. Cesar Perez, 596 F.2d 486, 492 (1st Cir. 1979). And, as at least one court has noted, "a losing party can always argue that [s]he misconceived the law." Troxel Manufacturing Co. v. Schwinn Bicycle Co., 489 F.2d 968 (6th Cir. 1973).

plaintiff's motion to permit further briefing and argument on her alternate due process claim is the functional equivalent of a motion to amend her complaint.[9/] The spirit of the Federal Rules of Civil Procedure would dictate that such a motion to amend would be liberally allowed, but only where the interest of justice were served by such an allowance. Foman v. Davis, 371 U.S. 178, 182 (1962).

It is beyond cavil that the allowance of a motion to amend is discretionary with the trial court. Zenith Radio Corp. v. Hazeltine Research Inc., 401 U.S. 321, 330 (1971); Foman v. Davis, supra. Foremost among the factors that the court should consider in exercising its discretion is the prejudice which will inure to the opposing party if the amendment is allowed. 371 U.S.at 182. Here, the trial court afforded primacy to that consideration, noting that "It would be unfair to defendants, after . . . [having] prevailed on the equal protection and now the due process theories originally presented, to allow plaintiff to test yet another theory and to continue on what would become a new law suit." (J.S. 10a)

The injury to the state defendants would be exacerbated by the fact that they negotiated the Statement of Agreed Facts in this case without concern

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9/See, United States v. Charest, 602 F.2d 1015 (1st Cir. 1979); Bryne v. United States, 218 F.2d 327, 335 (1st Cir. 1955).

for this new claim. If the plaintiff had been permitted to argue her new theory of a Constitutional violation, the defendants would have been prejudiced in the sense that they were not given the opportunity to present facts relevant to the particular new claim. The prejudice to the Commonwealth is further magnified by virtue of the cloud the new claim would have unnecessarily imposed on the civil service employment rights of preference-eligible individuals, who received a point preference as opposed to a positional preference during the pendency of the district court proceedings. Mass. St. 1976, c. 200.

Another key factor in the exercise of discretion is whether the motion for further briefing and argument was timely. Where a litigant could have presented a particular theory of recovery at the outset of the case or during the progress of the litigation, she should not be permitted to rely on her misconception of the law as an excuse for the late presentation of an alternate theory of recovery. Troxel Manufacturing Co. v. Schwinn Bicycle Co., 489 F.2d 968 (6th Cir. 1973). It was only after remand that the plaintiff chose to cast her due process claim in a non-sex specific manner. Mrs. Feeney's characterization of her due process claim as one arising from sex discrimination was a conscious strategy of litigation; she has always been a member of

both the class of Massachusetts citizens who are non-veterans as well as the sub-class of female non-veterans. There is absolutely no reason that Mrs. Feeney could not have pressed her claims on behalf of the entire class during the course of this litigation, and no reason for her now to repeat the litigation cycle on the "new" theory or as a representative of a new class.

The merits of the Plaintiff's "new" theory may also have been a factor in the discretionary decision whether to permit the equivalent of an amendment to the complaint. The new theory may be articulated in the following terms: by systematically excluding non-veterans from meaningful civil service employment, application of the veterans preference statute denies them of a liberty interest in violation of the due process clause. In light of the law of this particular case, however, that is a demonstrably specious theory.

In paragraph 36 of her complaint, Mrs. Feeney alleged that by "systematically excluding qualified and eligible female applicants on the basis of sex, the Massachusetts Veterans Preference Statute deprived the plaintiff of the equal protection of the law and of due process." (J.S. 5a, 6a.) That claim, which was rejected by the lower court, differs from the so-called "new" claim only in that it characterizes the interest in prospective employment as a liberty interest and in that it

applies to persons of both gender. Neither of these factors is sufficient to render her new claim significantly different from the claim already decided against the plaintiff. Thus, when the lower court suggested that the "new claim at very best face[d] an uncertain future," (J.S. 10a), it was not engaging in hyperbole; the plaintiff simply could not prevail on her new gender based alternate theory.

Under all the circumstances of this particular case, the lower court did not abuse its discretion by denying plaintiff leave to brief and argue this newly developed due process theory.

CONCLUSION

For all the reasons set forth above, the Appellee respectfully submits that the question upon which this cause depends is so unsubstantial as not to require further argument and therefore moves the Court to affirm the judgment entered in the cause by the United States District Court for the District of Massachusetts.

Respectfully submitted,

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